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In The

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE OCHS,
PETITIONER

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner's right to due process was violated in connection with consideration of his Rule 35 motion in circumstances where the District Court denied his request that it order updated psychological materials and then predicated denial of the motion on the lack of such materials and instead relied on materials in excess of ten years old?

2. Whether as a matter of law the information provided to the District Court concerning petitioner's positive adjustment in prison required that it modify petitioner's sentence because it previously promised petitioner that such achievement would result in modification?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 8, 1980.

OPINIONS BELOW

The Judgement Order of the United States Court of Appeals for the Second Circuit is appended to this Petition as is the opinion rendered by the Honorable Irving Ben Cooper, U.S.D.J. They are appended to this petition as Appendices A and B. A timely petition for rehearing was denied on January 8, 1981. A copy of this order is attached hereto.

JURISDICTION

The jurisdiction of the Supreme Court to review the Final Judgment of the United States Court of Appeals for the Second Circuit is based on 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Petitioner seeks review of issues of law arising under **Fed. R. Crim. Proc. 35** and the Fifth Amendment to the United States Constitutions.

STATEMENT OF THE CASE

I

Factual Background

A. The Underlying Conviction

Petitioner was arrested by two New York City uniformed police officers while occupying a parked, borrowed automobile on September 5, 1975. Petitioner and a companion were transported to police headquarters where the vehicle was impounded over the objections of the driver of the vehicle who was not arrested. The contents of the vehicle was searched for "inventory" purposes. Two locked briefcases were discovered in the rear seat area. Those briefcases were searched without a warrant and the contents thereof (on a second search) were carefully read.[1] The materials uncovered in the briefcases by the State authorities were forwarded to Federal authorities. In the interim, all State charges were dismissed. Petitioner

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[1] It is imperative to note that presently controlling law condemns the search of a locked briefcase absent probable cause and exigent circumstances. Thus, by present constitutional norms the search was illegal. See **Arkansas v. Sanders, 99 S.Ct. 2586 (1979).**

was indicted on the basis of those materials over two years later. Trial commenced on January 16, 1978 and on February 3, 1978 petitioner was convicted of: extortionate extension of credit; obstruction of justice; three counts of claiming false income tax exemptions, failure to file a tax return and attempted evasion of taxes. On April 14, 1978, the Honorable Irving Ben Cooper, U.S.D.J., imposed an aggregate sentence of 23 years in Federal Prison on petitioner for those convictions. Judge Cooper imposed the statutory maximum sentence on the obstruction of justice and false tax exemption counts.[2] Petitioner unsuccessfully appealed the convictions and sentences.

B. Petitioner's Sentencing And Subsequent Rule 35 Motion In District Court.

At the time of sentencing, Judge Cooper noted that petitioner's involvement in crime, al-

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2 Statistics published by the Administrative Office of the Courts indicate that this court's imposition of an aggregate term of eleven (11) years for the four tax counts was in the upper 2% severity as compared to tax felony sentences imposed by our district courts. Thus, of 690 felony tax defendants sentenced in 1979 only 11 were sentenced to a term of 60 months (5 years) or more. Less than

(continued)

though non-violent, had persisted throughout his life. The court also noted that petitioner is an intelligent individual who has the capacity to turn his life in a positive direction. Consistent with these countervailing considerations, the court imposed a unusually harsh sentence (23 years) but indicated on the record that should petitioner while in prison "behave in such a way and so convincingly" the court would give serious consideration to a reduction of the sentence.

On March 11, 1980, approximately two years subsequent to sentencing, petitioner filed a timely motion for a modification of sentence pursuant to **Fed. R. Crim. Proc. 35** before Judge Cooper. Petitioner sought a reduction of sentence or, in the alternative, establishment of a minimum term at

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2 (continued)

half received any incarceration and the average sentence was less than two years. (22.3 months). This unusually severe sentence was predicated apparently on the court's perception that petitioner's likelihood for successful prison adjustment was meager. The last three years during which petitioner has achieved a praiseworthy evaluation supports that the assumption was unwarranted.

the expiration of which he would be eligible for parole pursuant to 18 U.S.C.A. Sec. 4205(b)(1) or a maximum term after which he might in the discretion of the parole board be released on parole pursuant to 18 U.S.C.A. Sec. 4205(b)(2). As part of the motion, petitioner requested that the court conduct a hearing at which he would be present. Petitioner further requested that the Court order production of all materials which it deemed relevant from within the files of the prison at which petitioner was housed. As grounds for modification, petitioner relied on his positive adjustment in prison for a period of over two years. The evaluations of petitioner by prison doctors and personnel reflected that he had performed as admirably as is possible within a prison setting. Petitioner's behavior was a direct response to the court's invitation to return before it with a good record of adjustment and implicit promise that such a record would result in a modification.

The District Court denied petitioner's requests for a hearing and production of any materials prepared by penal institution personnel

respecting his rehabilitation which the court deemed relevant. No notice of a denial of the requests was forwarded to petitioner. Petitioner learned that the requests were denied when he received the court's opinion on May 7, 1980. The court declined to modify the sentence. In doing so, the court stated that had petitioner produced current psychiatric and psychological data in the form of testimony, such evidence might well have "turned the tide" in his favor. In fashioning this conclusion, the court relied on outdated psychiatric data which was in excess of ten years old. More importantly, in actuality the court prevented petitioner from presenting testimony because it denied him a hearing and from producing current psychiatric and psychological materials because such data was required to be ordered by the court. Petitioner had no independent means to ascertain that the Court would rely in conclusive fashion upon material not available to him. In short, the court denied petitioner access to pertinent evidence and then denied his motion because of a lack of the evidence.

C. Review by the Second Circuit Court of Appeals

Petitioner appealed denial of his Rule 35 motion to the Second Circuit. The crux of petitioner's appeal was the clear and flagrant violation of his due process rights. In petitioner's view, there could be no more egregious a violation than that committed by the District Court. That court refused relief to petitioner on the ground that he failed to produce data which only the court itself could secure. The panel of the Second Circuit at argument was concerned that no petition for rehearing before the District Court was filed asserting the violation of due process. Thereafter, the Second Circuit issued an opinion which ruled against petitioner on the ground that no specific request was made to the District Court for psychiatric or psychological data prior to the judgment and no petition to rehear was filed on this basis. That Court further concluded that there was no violation of due process because no updated materials existed. The Court acknowledged prison officials were ready and willing to generate such materials if requested to do so by

the District Court. The Court also of necessity had to conceive that there was no means for petitioner to anticipate that the District Court would rely conclusively upon psychiatric materials. As noted, the District Court's response to petitioner's motion for production of all relevant materials was denied without explanation. The Court was clearly the judge of relevancy.

Petitioner filed a petition for a rehearing before the Second Circuit pursuant to **Fed. R. App. Proc. 40.** The principal grounds relied upon by petitioner were that the panel of the Second Circuit which decided the appeal failed to apprehend that there is no procedure for a rehearing by the District Court of a **Rule 35** motion (after expiration of the time period) and that his request for all relevant materials was intended to permit the court to exercise its discretion to order whatever data was required for a fair disposition of the motion to reduce. The Second Circuit pondered the petition for rehearing for several months and then denied it.

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Summary of Argument

It is petitioner's position before this Court that review is required to correct a fundamental violation of substantive due process and a **fortiori** a manifest injustice. The District Court denied substantial relief to petitioner on the ground that he failed to produce evidence which only the Court itself could procure. The District Court refused to procure the data and then accorded conclusive weight to its absence. Prior to consideration of the **Rule 35** motion, that Court invited petitioner to return to it with evidence of his best efforts at rehabilitation, promising that it would be rewarded. Perhaps the Court did not anticipate that petitioner would be able to discipline himself in the manner which he did. The quality of petitioner's readjustment was unassailable. Apparently groping for a means to deny relief, the District Court refused to order production of materials which it deemed as determinative of the issue of relief and which it alone could procure. We believe that there can be no more

compelling an example of an abuse of judicial discretion resulting in an infringement of due process. Such an example of impropriety must be condemned by this Court without regard to whether it perceives that relief was properly denied. See **Matter of Bleaufontaire, Inc., 634 F.2d 1385 (5 Cir. 1981)** (Individuals charged by Congress with the administration of procedures must exercise good faith judgments); **Harris v. Wyrick, 634 F.2d 1152 (8 Cir. 1980)** (Due process is violated where the error asserted is of such magnitude that it failed to afford the individual fundamental fairness which is the essence of due process).

What has been said thus far, however, is not intended to suggest that the underlying decision to deny relief is less egregious and erroneous than the woefully patent violation of due process. Petitioner presented to the District Court and the Second Circuit a compelling request for fresh consideration and modification of his sentence. This Court, in the area of sentencing, should provide a statement as to the importance

of refraining from issuance of false promises to criminal defendants. See **Santobello v. New York, 404 U.S. 257 (1971).** Rule 35 to a great extent has become a hollow remedy because courts have labored without any well-defined structure, both with respect to sentencing matters generally and causes sufficing to mandate reductions. Sentencing procedures are as important as trial procedures. Indeed, incarceration in the ordinary case has a greater effect than the stigma of the conviction itself. It is the confinement in prison which has the most lasting impact upon the inner person. To that extent, the procedures respecting sentencing should be as scrupulously constructed as those at trial.

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Reasons for Granting the Writ

POINT I

CERTIORARI SHOULD BE GRANTED TO CORRECT THE MISAPPREHENSION OF THE SECOND CIRCUIT THAT NO DUE PROCESS VIOLATION INHERED BECAUSE THERE WERE NO PRESENTLY EXISTING CURRENT PSYCHOLOGICAL MATERIALS.

The District Court predicated denial of petitioner's motion to reduce sentence on psychiatric and psychological materials which were prepared in excess of ten years ago. It stated, however, that current materials might have caused it to reach a different result. Petitioner had requested as part of the motion that the court order all relevant materials necessary to an informed resolution of this matter. Only the court could order release and/or preparation of current materials germane to petitioner's progress while incarcerated. On appeal to the Second Circuit, petitioner argued that it was fundamentally unfair for the District Court to deny his motion for lack of production of materials which only the court could order. The panel of the Second Circuit which de-

cided the appeal stated that there was no denial of due process because no current materials existed. The panel's opinion reflects a fundamental misapprehension of the due process violation. There were no current materials on file and only the court could order preparation of these materials. Yet, the District Court based its ruling on the lack of those materials. More importantly, it tantalized defendant by stating that current materials might well have turned the tide in his favor. Understood in this context, we submit that there was a clear due process violation which is not to any degree mitigated by the lack of current materials.

A writ of certiorari by this Court is necessary to ensure that petitioner is provided a decision respecting his motion to reduce on the basis of a clear apprehension of the factual circumstances underpinning his claims. Plainly, the Second Circuit did not appreciate the factual circumstances or it could not have placed conclusive reliance upon the non-existence of current materials. Such a fundamental misappreciation of a

cherished principle of constitutional law by a Circuit Court of Appeals cannot be overlooked by this Court. It is the ultimate responsibility of this Court to conform the law of a circuit to that which is required by the Constitution.

POINT II

CERTIORARI SHOULD BE GRANTED TO CORRECT ERROR OF THE SECOND CIRCUIT IN ITS FINDING THAT PETITIONER SHOULD BE CHARGED WITH A PROCEDURAL WAIVER FOR FAILING TO MOVE FOR A REHEARING IN CIRCUMSTANCES WHERE THERE IS NO PROCEDURE FOR A REHEARING.

The Second Circuit was concerned that the District Court was not specifically informed that petitioner desired that it order current psychological and psychiatric data in the event that such data was deemed to be relevant. In petitioner's view, the Distric. Court was in the best position to judge relevancy because it was to decide the motion. The court should have, therefore, ordered the psychiatric data since it ultimately afforded conclusive relevancy to the lack of such materials. Petitioner requested production of all relevant materials. The Second Circuit partially predicated its finding that no due process violation occurred on the failure of defendant to move for a rehearing. The panel erred in this regard because there was no procedure available to defendant to facilitate a rehearing by the District Court.

A Rule 35 motion or a succession of such motions must be filed within 120 days of the date of decision of defendant's final appeal. Subsequent to that period, the District Cjourt has no power to review the initial or any successive motion under the Rule. See **United States v. Robinson, 457 F.2d 1319 (3 Cir. 1972).** The 120 day time period is jurisdictional and the passing of the period absolutely precludes review by the District Court of a Rule 35 motion. See, **United States v. Bryan, 498 F.2d 366, 367 (5 Cir. 1974).** Petitioner filed his Rule 35 motion on day 120 and when that motion was decided, he had no time left in which to file a successive motion in the District Court. The panel below erred in its finding of a procedural waiver.

A writ of certiorari is necessary in light of the legal error of the panel which led it to charge petitioner with a procedural default. Fundamental fairness demands no less. The error resulted in denial to petitioner of a valuable remedy, viz. reduction of his sentence. To this extent, there is no basis for a finding that it was harmless.

POINT III

CERTIORARI SHOULD BE GRANTED AND THE MATTER REMANDED FOR RECONSIDERATION SUBSEQUENT TO PREPARATION OF UPDATED PSYCHOLOGICAL MATERIALS.

The District Court denied petitioner's requests for a hearing and production of materials prepared by penal institution doctors and personnel respecting his rehabilitation. The materials sought by petitioner included any materials deemed relevant to his present ability to function in a non-custodial setting. Petitioner did not request immediate release from prison. He merely requested that the District Court acknowledge that current information as to his institutional adjustment and psychological well-being indicated that the unusually harsh and lengthy sentence (an aggregate term of 23 years) no longer represented a carefully structured exercise of sentencing discretion and rational application of prevailing law required that it be modified.[3] The hearing itself

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[3] In this regard, it bears note that the tax offenses related to deductions taken from legitimately earned income. Petitioner took deductions for a common law wife and children. For these offenses, the court imposed the maximum sen-

(continued)

was intended to permit scrutiny of petitioner's demeanor with respect to his claim of sincere contrition and rebuttal of bare assertions by the government that petitioner was withholding information relevant to detection and prosecution of alleged cohorts. Subsequent to its denial of petitioner's requests that he be permitted to come forward with both physical and documentary evidence, the court denied the motion to reduce sentence due to the failure to present the evidence encompassed by the requests. The procedure resulting in the decision below must be condemned. The motion was denied for failure to come forward with evidence to which the court precluded petitioner access. Where a court denies a motion on the ground that evidence is lacking to which it denied the criminal defendant access, serious issues of bias and prejudice become apparent. This is particularly true where no rule of evidence or other legal constraint permitted, let

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tences. Petitioner clearly was not a major tax evader. Those sentences have no basis in reason or law. This is particularly clear when it is observed that the taxes amounted to less than $2,500.

alone required, suppression of the evidence.

The District Court, relying mainly upon materials submitted to it at the time of sentencing, issued a 31-page opinion denying petitioner's motion to reduce sentence. In allegedly extending to him the fresh consideration of his prognosis for rehabilitation to which he was entitled, we iterate that the court considered only previously submitted materials and memoranda submitted by the parties. The court refused without explanation to conduct a hearing or to permit oral argument. Petitioner also requested production of any information deemed relevant which was in the exclusive possession of the penal institution or which could only be secured or generated pursuant to a court order. The court refused to issue such an order without provision of a statement of reasons.

In passing upon the merits of petitioner's claim and thereafter denying the motion, the District Court stated:

> ...So thin is the evidence before us. In view of what is known of the whole man before and since our sentence was imposed, satis-

> factory evidence of true rehabilitation and contrition, involving solidly embedded moral values that assure his own good moral living without danger to the community, are best left to the behaviorist, the psychiatrists and scholars in allied fields, whose impressive testimony might well have turned the tide in defendant's favor.

Thus, in denying the motion, the court specifically relied on a paucity of evidence concerning the sincerity of petitioner's claim of contrition and the absence of current psychiatric, psychological and sociological data. The hearing which petitioner was denied precluded any input concerning the sincerity of his contrition. Petitioner's offenses were largely victimless offenses and he is not, therefore, able to make restitution or provide a similar service as evidence of his sincere contrition. His sole means of demonstrating contrition and conveying his plea for forgiveness other than through his exemplary adjustment in prison was in an appearance before the court. The refusal to conduct a hearing therefore deprived petitioner of the opportunity to satisfy the court's standards as to contrition. In reference to psycholo-

gical and psychiatric data, petitioner could not procure it for presentation to the court absent an order to the prison authorizing release of the data. The court's unexplained refusal to issue the order, therefore, closed that avenue of evidentiary documentation. Plainly, this procedure was ill-designed to accord petitioner a fair disposition of his motion.

It is instructive to set forth the purposes to be served by a motion to reduce sentence. A motion to reduce sentence under Rule 35 is founded upon the assumption that a certain amount of time has passed between the imposition of the sentence and the time when the court's power to reduce or correct it is sought to be invoked by the convicted defendant. A motion to reduce sentence is essentially a plea for leniency. **United States v. Ellenbogen, 390 F.2d 537, 543 (2 Cir. 1968), cert. den. 393 U.S. 918 (1968). Cf. Poole v. United States, 250 F.2d 396, 401 (D.C. Cir. 1957).** The rule is intended to give every defendant a second round before the sentencing judge, and at the same time, it affords the judge

an opportunity to freshly reconsider the sentence in light of any further information about the defendant or the case which may have been presented to him in the interim. **United States v. Ellenbogen, supra.** As previously noted, the plea for a reduction is addressed to the discretion of the sentencing court. **McCartney v. United States, 382 F.2d 116, 118 (9 Cir. 1967). Cf. United States v. Prince, 533 F.2d 205, 208-209 (5 cir. 1976).**

Although a defendant is entitled to fresh consideration of his sentence and the court may reduce a sentence simply because it has rethought its original reasons, motions to reduce are generally denied in the absence of new materials demonstrating a salutary need for alteration. **United States v. Sand, 541 F.2d 1370, 1378 (9 Cir. 1976); cert. den. 429 U.S. 1103 (1977). Cf. United States v. Erb, 425 F.Supp. 1349, 1351 (S.D.N.Y. 1977)** (motion denied because all considerations which were before the court at the time of sentencing and relied on still existed and had not lost their significance); **United States v. Stromberg, 179 F.Supp. 278, 280 (S.D.N.Y. 1959)**

(motion will be denied where no facts were presented either by affidavit or an oral argument which were not before the court at the time the sentences were imposed).

Where changed circumstances are, in fact, presented to the sentencing court, it must give fresh consideration to the defendant's request for reduction of sentence in light of the new information. A refusal to consider changed circumstances is contrary to the purposes of rule 35 and an abuse of discretion. **United States v. Jones, 444 F.2d 89, 90 (2 Cir. 1971).** Thus, the court is compelled to consider new information. The court is required to balance the interest in maintaining the previously imposed sentence against the changed circumstances. Where the changed circumstances are entitled to more weight than the interest in upholding the sentence, it should be modified. **Id. Cf. United States v. Kee Ming, 424 F.2d 1286, 1291 (2 Cir. 1970); United States v. Birnbaum, 402 F.2d 24, 30 (2 Cir. 1968); cert. den. 394 U.S. 922 (1969).**

In the instant case, petitioner sought to

demonstrate that prior information concerning his psychi and his ability to reform himself was no longer accurate and that he experienced extreme remorse for his past ill-deeds. In this context, petitioner requested that the court order the production of any documents which it deemed relevant to underscore the veracity of his claims as to changed psychological and moral circumstances. Further, as previously noted, in connection with this request he asked that he be allowed to personally appear before the court. The District Court, which previously invited him to return before it at the appropriate time to present such an alteration in his personal circumstances, denied the requests and, in essence, precluded a demonstration of changed circumstances. More importantly, the court denied the motion for lack of the evidence to which it precluded him access. Further, despite evidence of positive adjustment in prison and a plea for forgiveness within the moving papers, the court found no evidence of changed circumstances. The abuse of discretion in this regard is both manifest and shocking. More importantly, the violation of due process is intolerable.

POINT IV

CERTIORARI SHOULD BE GRANTED TO FACILITATE ISSUANCE OF A STATEMENT THAT AS A MATTER OF LAW THE POSITIVE ADJUSTMENT IN PRISON EXHIBITED BY PETITIONER WARRANTED A REDUCTION OF HIS SENTENCE.

At sentencing, the District Court gave paramount consideration to the recognized correctional purposes of protection of society, punishment and deterrence.[4] In his motion to reduce the aggregate sentence of 23 years, petitioner requested that the lower court freshly consider the sentence and, through resort to the power of lenity, exercise its discretion to modify that sentence to an effectively lower term. In the brief filed in support of the motion, petitioner did not to any extent seek to mitigate his prior conduct as he believed that the sentencing court carefully considered all relevant factors and fashioned a sentence which mirrored its perceptions. In our

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[4] In its opinion concerning the Rule 35 motion, the court stated that it was swayed by petitioner's past life, health, habits, conduct and mental and moral propensities. Although not exemplary, his past life was not as dreadful as the court indicated in the opinion. Petitioner spent much time in prison for offenses which are not presently criminal.

view, it would have been inappropriate to essentially relitigate the merits of the prior sentence. The Rule 35 motion was predicated on petitioner's belief that his positive adjustment over a period of two years in prison indicated that he poses no present danger to society and that he need not be so severely punished to be deterred from future anti-social conduct. In that regard, petitioner neither asked nor expected that he be immediately released from prison. Petitioner acknowledged that he owes a debt to society. He has shouldered that responsibility with a positive frame of mind. He merely requested that the court reconsider the amount of the debt in light of his recent contributions. Succinctly stated, petitioner presented new and compelling information to assist the court in measuring his amenability to rehabilitation.

Confronting an aggregate term of 23 years in prison and an assessment by the sentencing court that there existed a "meager" possibility that he would "straighten himself out," petitioner entered prison and undertook a pattern of steady

improvement in his attitude and outlook. It is probative to note that he was not bitter and did not despair in the face of parole eligibility only after a term of 78-90 months. Indeed, reports submitted by the Bureau of Prisons reveal that petitioner has demonstrated uncommon industry and initiative in his attempts to deport himself in a manner which credits the institution and bespeaks his real desire to assume an honest and earnest position in society upon his release. In this period of time, the evaluations of petitioner have risen from average and agreeable to consistent excellence. The reports indicate that he has done more than is required of him and his cooperative attitude and deeds have "added a positive touch to the...institution." Prison doctors and personnel who have worked with him in the institution's hospital describe petitioner as "efficient, competent and dedicated...well worthy of emulation by his peers." Moreover, throughout the reports, much mention is made of the observation that petitioner is highly intelligent and possesses all the necessary skills for a positive

re-entry into society. Indeed, a past employer has indicated that he would gladly re-employ petitioner in his business. In this context, it should be emphasized that all those who have come into contact with him at the institution "recommend him for whatever [positive] consideration may be forthcoming" including parole at the earliest possible time. Further, the family, community and many friends of petitioner anxiously await his return to their midst.

Petitioner has, therefore, demonstrated a strong and determined effort to rehabilitate himself and to prove that he need not be incarcerated for the period previously imposed. This effort, extending over a period of two years and ten months, merits reduction of the sentence which is extraordinarily excessive. Petitioner has essentially reformed himself and become by all accounts a model prisoner. He received and is serving the maximum sentence on nearly all counts and those sentences were made to run consecutive. Clearly, such a severe sentence has the plain capacity to be counter-productive in this case.

On the basis of the reports concerning his clear and unmistakable progress and an analysis of legal authority interpreting the proper exercise of the power to reduce a sentence pursuant to Rule 35 and to set a parole date pursuant to 18 U.S.C.A. Sections 4205(b)(1) and 4205(b)(2), petitioner respectfully requests that this Court issue a statement that as a matter of law he is entitled to a modification of his sentence.

In its review of petitioner's present record in prison, the District Court focused on petitioner's past record in prison which was also problem-free. The court, in essence, found the present evidence of exemplary adjustment to be inconsequential because it did not stand in marked contrast to his past performance. The court stated:

> We are told that Ochs has been very industrious throughout the past two years of his incarceration. This is not a new strength he has acquired, for that characteristic has always been true of him -- in and out of his illegal pursuits (the presentence report establishes this convincingly). In our judicial time, over and over again we have seen "model" or "exemplary" prisoners upon

> early release either "make good" in life or succumb sooner or later to the magnetism of the urge to pick up where they left off. The fact is that defendant's prison behavior a great many years ago was given a high rating. In a word, on an application such as the one before us, commendable prison deportment is only some evidence on the issue to be resolved, neither to be disregarded nor overestimated.

The court's negative reliance on positive aspects of petitioner's past is indicative of its inability to deal fairly with him. This negative reliance is consistent with its suppression of relevant evidence. In this context, it should be observed that the court also relied on previously prepared psychiatric reports. And, as noted in Point III, **supra**, petitioner was precluded from rebutting the results of those reports with current ones by the court's refusal to order production of such reports.

Petitioner was given an extremely harsh and severe sentence. He has utilized the period of incarceration to demonstrate that he is capable of functioning as a responsible human being. The District Court stated that all it has as evidence

of petitioner's remorse and contrition is his word for it. We dispute that observation. Petitioner has done all he can do, both in word and deed. Petitioner incidentally was convicted primarily on evidence which if seized today could not form the basis for a criminal prosecution. See Factual Background, *supra*. Petitioner also in the past served a ten year sentence for a non-violent act which is not presently a crime. Moreover, at sentencing and throughout the appeal, the government grossly misrepresented the extent of his prior non-violent record. Although he is aware that his fortune in life has not been the best, he is not angry and does not feel cheated as he realizes that he is largely responsible for all the negative occurrences. He has accepted his lot and resolved to make whatever time he has left in life productive and full.

In sum, petitioner's conduct during his nearly three years of incarceration indicates that he has made persuasive progress and that this Court has ample ground upon which to issue a statement that he was entitled to a reduction of

his sentence. "Incarceration for the period previously imposed would not serve the purpose of changing him to be a more constructive person." United States v. Barber, 466 F.2d 579 (3 Cir. 1972).

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant the petition.

Respectfully submitted,

By _____
STEVEN H. GIFIS
Attorney for Petitioner-
George Ochs

Alan Dexter Bowman

On the Petition

Dated: March 9, 1981

Appendix

APPENDIX A - OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff-Respondent,	:	77 Cr. 775 (IBC)
-against-	:	
GEORGE OCHS,	:	OPINION
Defendant-Movant.	:	

APPEARANCES:

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Of Counsel

IRVING BEN COOPER, D.J.

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Having served two (2) years of a sentence of twenty-three years which we imposed on April 14, 1978, defendant presents us with his application for a reduction of sentence, Fed.R.Civ.P. 35; or, in the alternative, for establishment of a minimum term at the expiration of which he will be eligible for parole, 18 U.S.C.A. Sec. 42-5(b)(1); or a maximum term after which he may be released on parole, 18 U.S.C.A. Sec. 4205(b)(2).

The defendant was indicted on October 26, 1977 for extortion, obstruction of justice and income tax offenses. The trial by jury commenced January 16, 1978 and concluded with a verdict of guilty on all seven counts on February 6, 1978 (maximum jail term 40 years). He was remanded for sentence and has been confined ever since.

Besides the jury verdict that the defendant was guilty of extortion, income tax evasion and obstruction of justice, we should point out that the evidence adduced at trial supported the Government's insistence that the defendant made

threats of murder to collect a usurious loan; that he engaged in substantial tampering with both the grand jury and trial processes; that his income tax returns were filled with false assertions of a material nature which substantially reduced the income tax due, and that his illegal sources of income included loansharking and prostitution as well as extortion.

Defendant's conviction was affirmed by our Circuit Court of Appeals on May 13, 1979 (595 F.2d 1247); petitin for certiorari was denied by the Supreme Court of the United States on November 13, 1979 (100 S.Ct. 435).

Defendant's claim of rehabilitation and contrition

In support of his application, the defendant emphasizes his "exemplary" record of deportment during the first two years of the sentence we imposed including his observance of all penitentiary rules and regulations and his conscientious fulfillment of all work assignments for which he has received high commendation from

prison personnel. In support of this, he calls our attention to memoranda filed by responsible members of the staff connected with the penitentiary describing the defendant as: "cooperative and polite with a pleasant and cheerful attitude and personality"; "dependable"; "His duties [as hospital orderly] are the cleanliness of various offices and sanitation in general... I found him most cooperative with both inmates and staff... a good positive attitude... has voluntarily performed other work"; "He has made several suggestions which improved the maintenance of this hospital." Drawing on several such reports, the progress report of defendant's case manager dated November 1979 includes the view that the defendant is: "an excellent worker, who utilizes initiative in his ability to perform his duties under minimum supervision." The progress report further notes: "Tentative Release 06-05-93" and concludes: "At this juncture, the A-West Unit Team respectfully requests that Mr. Ochs be granted parole at his

parole eligibility date, with his release to be facilitated through a community treatment facility, upon his qualification..."

In his hand-written letter to us received March 21, 1980 (made a part of the papers on this application), defendant proclaims: "I now ask to be judged by American standards of fairness." He complains that each and every one of the sentences he ever received were harsh and severe; that some of his actions in the early part of his criminal career are not regarded as criminal today; he blames himself for bringing grief to his family stating that: "because of my stupid silly acts...I well realize the error of my ways and the manner that I have wasted my life....I broke the laws of society for which no one is as sorry as I am."

Based solely on what we have so far generally recited, defendant's counsel urges us to consider: "[M]ovan[t] [has made] progress during his already lengthy period of incarceration." Memorandum of Law on Behalf of Defendant-Movant

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In Support of Motion for Modification of Sentence, p.l. [hereinafter Movant's Memorandum]. "Movant failed in the past because he was unable to accurately assess the nature and quality of his conduct with a meaningful understanding of the tenents of good and evil." **Id. at 2.** "[Defendant] made a positive adjustment in prison..." **id. at 3.** "[Defendant] has demonstrated a commitment to self-improvement and adjustment." **Id. at 5.** "[H]is positive adjustment over a period of two years in prison indicates that he poses no present danger to society and... he need not be so severely punished to be deterred from future anti-social conduct." **Id. at 7.** "Movant's spirit should not be buried beneath a sentence which...[does not] encompass the ability of the man to grow and change." **Id. at 7-8.** "[Defendant has a] real desire to assume an honest and earnest position in society upon his release." **Id. at 8.** "Movant has demonstrated a strong and determined effort to rehabilitate himself... [Defendant] has essen-

reformed himself..." Id. at 13. "[Defendant's] celerious rehabilitation appeared to be in the realm of the miraculous." Id. at 16. "[M]ovant's progress has exceeded all of the Court's expectations." Id. at 17. "[H]e has made persuasive progress..." Id. at 18. "[Defendant] has effected a complete reversal of the inertia which grasp [sic] him at age 16 and carried him through 32 years of lost life...It is...necessary to reassess [him]...in light of his new attributes." Id. at 20.

At sentence

At sentence we were confronted with a criminal behavior pattern we regarded shocking and repugnant to an offensive degree. We spoke plainly to the defendant in open court, employing language he would understand:

> I told you...that I have been a judge for almost forty years...I have seen the agony, the distress, the horror, the filth, as well as the glory of human behavior. [1]

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[1] Transcript of March 14, 1978, pp. 30-31

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It's easy for someone to say, "Throw the book at him," or "He's no damned good; let him rot," "Boil him in oil." I hear that all the time, even long before a person has actually been found guilty.

So I must ask myself, on the state of this record, just as the surgeon must ask himself on the basis of...x-rays and...tests, what do we do? Is a 20-inch incision imperative or can we do it with less? What is best for this patient? And so we ask ourselves what is best not only for this defendant but for the community?

I would be less than frank, Ochs, if I [did not tell] you that you have been your own worst enemy; that almost from the time you were a boy you were saturated with a sort of hatred for law and order. Whether at that time you could have been disengaged, so to speak, from harboring thoughts that led to your own downfall I don't know, but look at the record of your deportment, the periods of incarceration, and yet, as though it were a heavy drug, you have been unable to throw it off. You go forward with the same antisocial attitude that you had from the very beginning as a boy.

You are not a drug-user or a drug-seller, and yet when I look at those unfortunates who are the

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victims of it, I find that they too have an enormous burden that they can't shake. You have the equivalent. Every molecule of you, so to speak, is against authority. You have never been won over and [while] I can't say that it's too late,...[there is little chance] of your straightening yourself out and seeing what it means to be a person of self-respect, an American citizen who can walk straight and unafraid. I think the chances of getting you to subscribe to that are very, very meager. It's unfortunate, but who is to root it out of you?

I deplore the predicament in which you find yourself, but like the surgeon, he too deplores the pain, the aches, the almost helplessness of the patient, and yet he must operate.

There is nothing personal about this. It's the same judge who was on the bench forty years ago..."I want to know who the defendant is. I want more than what he did."

...

Although it's been my lot to be a judge all these years,...this case has given me as much concern as any case ever did. This business of growing hard and callous, it all depends on the human being involved...

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What is justice for this defendant and for the community?

I won't repeat, Ochs, the many things that have been brought out. You read the probation report yourself, [as did] your lawyer...

Your family is in court and I can't bring myself to go into details. I don't want to give you a lecture. I don't think the lecture would do you any good, and I don't think that the judge means anything to you except insofar as what he is going to, to use the vernacular, "hand out."

I don't think that I have that capacity to influence you, and so, therefore, I don't see any purpose by a recitation of what you have done with your life.

In my book, you have been in moral bankruptcy from the time you were a boy...[H]ow you... failed to see that you weren't getting anywhere is beyond me, because you are not a fool. You have a good head. You just didn't put it to use in the right direction.

When you point out to me, as your lawyer has, certain acts of kindness, I don't think I have ever dealt with a human being in all the thousands of cases in which I have participated who was so rotten that there wasn't

anything redeemable about him.

You are not totally bad. You are bad. And that was of your own choice...The charges are very serious; they can't be brushed aside.

If a judge can't let law prevail, he has no right to be a judge. If he hasn't got what it takes to stand up and say "This I believe in. This I do. And I go this way and not that way," he shouldn't be a judge.[2]

....

I am not here to determine whether or not you slashed somebody else unless there has been proof that is quite convincing to me. If I though that that was your method of behavior, I'd give you every day that the twenty years' maximum prescribes, and don't fool yourself about that. If that was your way of life, if that was your hallmark, you'd go away for twenty years on that one.

....

[T]he court has it within the Court's power to send you away for forty years and made no remarks at all, there is nothing

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2 Id. at 32-36.

in the law that says I have to do anything more than rattle off a time period. I choose to do it so that everybody can know what goes through the judicial noggin in order to arrive at a sentence that has to be meted out, not as a matter of choice, but as a matter of law.

[A]fter sober reflection -- and I have had a long time in this case to figure it out and search for what is due and proper -- the sentence of the Court is [a total of 23 years] ....

....

MR. BLOSSNER [defense attorney]: I would ask the court to run those particular sentences concurrently --

THE COURT: Mr. Blossner, did you hear the Court speak?

MR. BLOSSNER: I did, your Honor.

THE COURT: Did you think I was just rattling something off, or did you get the impression that the judge meant every word that he uttered?

MR. BLOSSNER: Not only did I realize that the Court meant every word, but I realize that the Court has given it an enormous amount of consideration.

THE COURT: Therefore, you see,

> your request is out of order. I could have done that without your telling me; it's obvious. I chose not to after reflection.
>
> Don't add on to it. Enough has been said.
>
> There is the Court's judgment after serious reflection...
>
> MR. BLOSSNER: I would ask that the Court...sentence him under the Section B(2) which would enable parole to parole him at such time as they see fit.
>
> THE COURT: Application denied, with permission to renew it in appropriate time.[3]

We get the impression that defendant's present counsel found no fault with the sentence when we imposed it on April 14, 1978, since he states that: "At sentencing, this Court issued a thorough probative statement as to its concerns and objectives in imposing the harsh sentence... The Court destroyed all illusions and left movant to confront the reality of his past and the bleakness of his future unless a transformation of his

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[3] Id. 37-41.

consciousness occurred... This Court, in its stinging articulation of movant's deeds, set in motion the effectuation of a new awareness... [T]his Court carefully considered all relevant factors and fashioned a sentence consistent with its evaluation... The Court sentenced an offender who it felt was in need of punishment for a lifetime of ill deeds." Movant's Memorandum at 1 - 7, 20.

Pertinent material absent

The moving papers fail to present a full disclosure of defendant's behavioral pattern up to the date of our imposition of sentence. During the lengthy appellate proceedings which ensued after the trial, the defendant raised, in our Court of Appeals and in the Supreme Court of the United States, the issue of the sentence he received. In rejecting his claim that the sentence we imposed was illegal, arbitrary and capricious, Judge Friendly wrote for the Second Circuit:

> We are not disposed to use this case to test the limits of our

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> power with respect to sentences that are within legal limits and are not shown to have been based upon materially inaccurate information. Judge Cooper was dealing not with a man who had simply yielded to the temptation to cheat the Government of income taxes by claiming false exemptions but with an individual whose whole life from the age of 16 to his then age of 48 had shown a contemptuous disregard for law. After serving jail sentences and being released on parole, he repeatedly violated parole by committing new crimes. On the undisputed record disclosed in the pre-sentence report, the judge could reasonably have given Ochs an even higher total sentence than he did. Particularly in light of our disposition of the suppression claim, we are not concerned with how the sentence was structured. (emphasis added)

United States v. ochs, 595 F.2d 1247, 1262 (2d Cir.), cert. denied, 100 S.Ct. 435 (1979).

The underscored words, supra, do not appear, even by reference, in the moving papers. Because other highly pertinent material has been omitted on this application -- vital to defendant and community alike -- relating to the possibility of "rehabilitation," "redemption" and early re-

lease of this defendant, we are constrained to fill in. To say the least, a full disclosure was in order, for we must know the whole person we are told has "reformed."

Indispensable is a thorough search for all details having even the slightest bearing on a defendant's character, past and present. Often such an inquiry proves rewarding, for it supplies insights into strengths and weaknesses not theretofore revealed and furnishes enlightenment as to how best to write the sentence prescription. This approach is imperative and has long been encouraged and approved. In the exercise of his discretion, the judge may

> consider information about the convicted persons' past life, health, habits, conduct, and mental and moral propensities...Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics...[The] modern philosophy of penology... [emphasizes] that the punishment should fit the offender and not merely the crime.

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Williams v. New York, 337 U.S. 241, 245 - 47 (1949) (emphasis added). See also 21 U.S.C. Sec. 850.

The indictment

The jury found this defendant guilty as charged in the indictment, the essential wording of which follows:

COUNT ONE

The Grand Jury charges:

1. From in or about early 1973 up to and including the date of filing of this Indictment, [October 26, 1977]...the defendant, owned and operated several New York City massage parlors, including the Studio 1 massage parlor, located at 100 West 43rd Street, New York, New York, which he operated as a house of prostitution.

2. From in or about April, 1975 up to and including September, 1975,...Debbie McElroy was employed as a prostitute at several New York City massage parlors, including the Studio 1 massage parlor...

3. On or about April 4, 1975, Debbie McElroy borrowed $1,500.00 from GEORGE OCHS,...and agreed to repay him the $1,500.00 plus $400 interest within nineteen weeks.

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4. From on or about April 4, 1975 up to and including September 30, 1975,...the defendant, unlawfully, wilfully and knowingly did use extortionate means, to wit, the use and the express and implicit threat of use of violence and other criminal means to cause harm to the person, reputation and property of Debbie McElroy, in order to collect and attempt to collect from the said Debbie McElroy an extension of credit and to punish her for the non-repayment thereof.

COUNT TWO

The Grand Jury further charges:

5. From on or about April 1, 1976 up to and including the date of filing of this Indictment, a duly empaneled United States Grand Jury was sitting in the Southern District of New York hearing evidence of possible violations of Federal criminal law in order to determine whether to charge certain individuals, including...the defendant, with having violated the Federal criminal law.

6. [I]n order to determine during the period of January 1, 1972 to October, 1977:

(a) Whether...the defendant, collected extensions of credit by extortion and threats (commonly referred to as "loansharking");

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(b) Whether GEORGE OCHS,...the defendant, threatened or inflicted bodily injury on Debbie McElroy for failure to repay a loan;

(c) Whether...the defendant, loaned money to individuals at usurious rates of interest and whether he threatened or inflicted bodily harm on said individuals for their failure to repay loans.

(d) Whether...the defendant, through a pattern of racketeering activity, including extortion and extortionate credit transactions, and through the collection of unlawful debts, acquired or maintained, any interest in any new York City massage parlors; and

(e) Whether...the defendant, evaded his federal income taxes and filed false income tax returns during the years 1971 through 1975 by failing to report the income he received as proceeds from extortion, loansharking and prostitution and by claiming false personal exemptions.

7. From on or about April 1, 1976 up to and including the date of filing of this Indictment,...the defendant, unlawfully, wilfully, knowingly, and corruptly did influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice by instructing persons who were subpoenaed to appear before the Grand Jury as wit-

nesses to give false, evasive and misleading testimony and to have said persons assert their Fifth Amendment privilege against self-incrimination before the said Grand Jury.[4]

....

COUNTS THREE THROUGH FIVE

The Grand Jury further charges:

8. On or about the 15th day of April following each of the years enumerated below in Counts Three through Five, [1971, 1972 and 1973]...the defendant,...who between January 1, 1970 and April 15, 1974 was not married, unlawfully, wilfully and knowingly did make and subscribe and cause to be made and subscribed, United States Joint Income Tax Returns, Form 1040, verified by written declarations that they were made under penalties of perjury and filed with the united States Department of Treasury, Internal Revenue Service, which ...the defendant, did not believe to be true and correct as to every material matter in that...

4

At sentence, Ochs said: "Every witness that I spoke to who I knew was going to the Grand Jury, I told them all not to run away and not to get themselves in trouble. I never intended to break any of the law by telling anyone that he had constitutional rights."
Transcript of March 14, 1978 at 27.

the defendant, falsely claimed theein that he was married and had children as set forth below in Counts Three through Five under the caption "false exemptions claimed," whereas, in truth and in fact, as...the defendant, then and there well knew, he was not married, did not have any children and was therefore not entitled to claim any income tax exemptions for a wife and children.

....

COUNT SIX

The Grand Jury further charges:

9. That during the calendar year 1974,...the defendant,...had and received a gross income of approximately $27,185.00; that by reason of such income he was, following December 31, 1974 and on or before April 15, 1975, required by law to make an income tax return...stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts,...the defendant, unlawfully, wilfully and knowingly did fail to make an income tax return...

...

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COUNT SEVEN

The Grand Jury further charges:

10. That during the calendar year 1974,...the defendant,...had and received a taxable income of approximately $23,685.00; that upon said taxable income he owed ...income tax of approximately $5,939.00;...that well knowing the foregoing facts,...the defendant, on or before April 15, 1975, ...did unlawfully, wilfully and knowingly attempt to evade and defeat the income tax due and owing by him...by failing to make an income tax return...by failing to pay...any income tax and by concealing and attempting to conceal sources of income derived from extortion, loansharking and prostitution as set forth in paragraphs 1 through 6 of this Indictment...

The presentence report

Defendant's counsel had full opportunity to examine the report before we imposed sentence. Its substance was commented upon during sentence. The highlights of that report are completely absent from the moving papers. In a thorough and carefully prepared report by United States Probation Officer Weber, we learned that

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defendant was born April 20, 1930; at time of sentence he was 5 feet nine and one-half inches; weight 275; single, no children; that he received a high school equivalency degree in 1952 and a New York State Regents diploma while in custody. Emphasis is placed on defendant's illegal activities during the greater part of his adult life; that he "resisted obtaining regular lawful employment" and concentrated over many years on the operation of massage (prostitution) parlors and loansharking. Upon his arrest by New York City police, defendant's personal records were seized and examined; the disclosures unmistakably showed that for many years he charged interest based on 25 percent of the amount loaned and colleted additional "vig" payments of 25 percent of each weekly payment if a payment was missed. Expert testimony introduced at trial estimated that Ochs had $100.000 in principal "on the street" (loaned out).

The probation report continues: "Ochs fur-

ther sought to conceal his income through the establishment of phony bank accounts through which he accepted payments in names other than his own...[H]e made loans to various prostitutes who worked at Studio I and other massage parlors and also made larger loans to [two men] who supplied the security guards for Studio I. One of the loans Ochs made was for $1,500 to Debbie McElroy on April 4, 1975 at a time when she was employed as a prostitute. [It] was to be repaid in 19 weekly payments of $100 each (thus $400 in interest); [defendant] continued to derive profits from his prostitution and loansharking even after he was remanded on this case." In the course of his interview with Probation Officer Weber, Ochs admitted that he derived income from Studio I and from loans made to various individuals, stating that "his initial motivation for lending money was largely philanthropic."

The presentence report further reveals that "The defendant has a very extensive criminal his-

tory marked by arrests for, charges relating to automobile theft, promoting prostitution and burglaries. A 1956 presentence report prepared for Nassau County Court reads, in part...Ochs' states that he has lived off the proceeds of prostitution, he has stolen cars for a living, and that he might be guilty of many offenses, but he is not a burglar.'"

Still another fact in the presentence report caught our attention. The records of the New York State Department of Correctional Services include a report by a psychiatrist in June, 1968 after his examination of defendant while a prison inmate. His diagnosis found defendant without psychosis but suffering from a "psychopathetic personality with asocial and amoral trends." Another psychiatrist in July, 1969 offered the diagnosis that Ochs suffered from a personality disorder, an "antisocial personality" of moderate severity.

From his interviews with the defendant and the research he conducted, Probation Officer

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Weber concluded that "Ochs is a persistent felony offender...that from at least 1955 onwards Ochs has been involved with violent behavior, either directly or implicitly. He displays no remorse whatsoever for his recent or past actions and has, to our knowledge, never expressed a desire to conform to the rules of society." (emphasis supplied)

The defendant's criminal record

From 1944-1977, Ochs was arrested thirteen (13) times on criminal charges which included rape, grand larceny, compulsory prostitution, burglary, armed robbery, criminal possession of stolen property, bribery, violation of parole, extortion by threat, tampering with witnesses called to testify, and income tax evasion. The dispositions varied, including dismissal of certain charges, suspended sentence, fines or probation; in sum the result was imprisonment for the greater part of this defendant's adult life.

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Out of a vast array of detail relating to his arrests and convictions, we select a few episodes we regard as significant. On February 17, 1950 Ochs received a sentence of 3 1/2 to 10 years in Bronx County Court. The charge was grand larceny. During the period July 22, 1949 to October 27, 1949, the defendant stole seven new Oldsmobile automobiles, two new Buicks and one new Pontiac, one of which he kept for himself and the others of which he turned over to William Uhl and Frank Martus (also prosecuted) who then sold them. The three men divided the proceeds equally among themselves. Records of the New York State Department of Correctional Services indicate that during the period February 1950 to February 1953, Ochs made a good institutional adjustment. While under subsequent parole supervision, the defendant resided with his parents and had a poor employment record. He was apprehended by the police on August 3, 1955 and subsequently absconded from supervision .

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On August 13, 1955 Ochs was apprehended again by New York City police on charges of Compulsory Prostitution and Rape and for Grand Larceny of an Automobile (stolen on April 14, 1955), but he escaped from custody prior to the completion of the arrest procedure. During the ensuing 11 1/2 months while he was a fugitive, he reportedly staged a simulated suicide, leaving a note indicating that he had jumped off the Triboro Bridge.

Subsequent to his apprehension on July 20, 1956, Ochs entered pleas of guilty to rape second degree and grand larceny first degree; he was sentenced to prison on November 21, 1956 where he remained until paroled on October 26, 1965; he was declared a delinquent parolee on April 3, 1966. When arrested on July 20, 1956, Ochs was allegedly in possession of a 1955 Chrysler automobile reported stolen on February 25, 1956. When apprehended on August 13, 1955, he was in possession of a Cadillac automobile valued at $3,000,

stolen that month.

As already mentioned, Ochs was paroled on October 26, 1965. On June 24, 1966 he was arrested by federal authorities on charges that he had participated in the armed robbery of a Staten island, New York post office (these charges were subsequently dismissed). Among the ten specifications in his violation of parole charges was the charge that on June 24, 1966 when apprehended, Ochs had in his possession a stilleto, a length of rubber hose, a blackjack, burglar tools, spurious police identification and a forged New York State driver's license. In addition, he was operating a vehicle without a valid license and the automobile he was operating, a 1960 Cadillac, was registered to [Joseph Keppel] a friend whom he knew to have a criminal record (they were arrested together during 1944 for Juvenile Delinquency - Grand Larceny Auto).

In a case pending at the time of sentence, defendant was charged with bribery, etc. It is

alleged that the defendant, acting in concert with two others, paid various amounts of money to the New York City Police Department officers who arrested him on September 5, 1975 in an attempt to have those officers falsely testify in regard to that arrest, and, also, to have them obtain copies for the defendant of his loansharking records. A portion of the evidence in that case was adduced upon the trial before us.

Rehabilitation

We have always believed in rehabilitation invariably accompanied by real contrition, as a power for good; we have encouraged it at every opportunity; we have witnessed the enormous benefits it can render offender and community alike; we do not "hand it out" -- rather, in the proper case, we prescribe it. We have our remedy if our extended hand is rejected or out faith in the capacity and potential strength of the offender proves misguided. See United States v. Poynter, No. 75-593 (S.D.N.Y. March 31, 1980).

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We deal here with a person whose whole being during the greater part so far of his adult life has been saturated with criminal intent translated into almost uninterrupted lawless activity. Without a doubt, he has been a determined offender against community wellbeing. Apprehension concerning his motives and movements is bound to ensue. The right to move safely, unmolested, to be secure at work and home, to be protected against frauds and schemers, is paramount. For it, the community pays a huge price, and is intolerant of failure or laxity on the part of its agents and instruments. It cannot be patient with or concerned about the welfare of offenders while they threaten its security and comfort. Many such offenders are crafty professionals whose aim is to bleed the community's resources for their own pleasures, at times using the instruments of the law itself to carry out and safeguard their operations and personal safety.

It is the constant and indispensable lot of

the Court to search thoroughly for solid evidence pointing to the innate potential of offenders for moral rehabilitation and to determine just what it will require for them to establish and maintain themselves along lines heretofore foreign to them and inimical to their way of life.

The Court must acquire knowledge and therefrom make a judgment as to the amount and kind of disciplinary action, in light of the offender's moral standards and educability (capacity and rate of learning), that will be needed to return him to an upright position in the community with sound attitudes towards it. What are the resources and what are the hazards for moral recovery? As with all human disorders, whether of disease or of morals, the forces of repair and recovery reside in the stricken organism. Like physicians, judges must make allowance for the recuperative powers of life itself, and to a degree, trust to a reoriented will to stabilize character and subsequent behavior.

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In our judicial experience over four de-- cades, we have seen examples (often quite stirring) of just that -- a defendant going from the depths of iniquity to the heights of uninterrupted living within the law. Repeatedly we have witnessed an offender errect a platform of self-deceit and on it go down to defeat, and while clinging to it, like the Phoenix, ascend and conquer. Often we have traced the progress of offenders through the stages of recovery. The sight of this excursus into the region of self-healing has been encouraging -- on occasion to the degree of excitement.

Defendant's present moral standards

As of today, what really are Ochs' moral standards and what is his educability (capacity and rate of learning)? His hatred of authority (an aspect of his disease), overwhelmingly established by a fair reading of his history, his alternate periods of self-pity and blame, are they all behind him now? Is he still morally immature?

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Is he prepared for life's challenges and has he the unwavering will to meet them because he has acquired the imperative capacity to do so? In a word, how deep-seated and impervious to attack is his moral conviction for clean living founded on good morals? What assurance have we that he will not slip back -- reinfect himself and infect still others? Is he unflagging in his determination to renounce to their face, and by neglect, his one-time buddies and "friends" of both sexes, and take on stricter and more demanding disciplines?

How do we go about certifying that the patient once dangerously ill is now on the way to complete recovery? The resolution of these pertinent questions, imperative if justice is to be done here to defendant and community alike, can hardly be undertaken on the woefully thin evidence -- qualitatively and quantitatively -- presented to us on this application.

We have searched in vain for meaningful

evidence of true contrition by Ochs (we only have his word for it). Nor is there even a murmur of a plea for forgiveness. Often we have witnessed offenders thrash about as they comment on the cause and the situation wherein their crimes have been incubated and matured; they expose and dissect their moral nature at the time of arrest; they demonstrate the perception and acknowledgement of fault, the will to make restitution, their acceptance of the community's moral sanctions. Not so with Ochs.

Defendant's industry and pleasantness

We are told that Ochs has been very industrious throughout the past two years of his incarceration. This is not a new strength he has acquired, for that characteristic has always been true of him -- in and out of his illegal pursuits (the presentence report establishes this convincingly). In our judicial time, over and over again we have seen "model" or "exemplary" prisoners upon early release either "make good" in

life or succumb sooner or later to the magnetism of the urge to pick up where they left off. The fact is that defendant's prison behavior a great many years ago was given a high rating. In a word, on an application such as the one before us, commendable prison deportment is only some evidence on the issue to be resolved, neither to be disregarded nor overestimated.

As to the pleasantness which has been observed throughout his penitentiary stay so far, we know (from the probation officer's report and letters received from family and friends) that there is a pleasant side to Ochs which he has invariably shown to family and friends for whom he professes deep affection[5] -- never, of course, giving them the slightest inkling of the extent of his departure from good moral standards.

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[5] At sentence defendant said: "I have a responsibility and a very strong love for my mother, sister and my childhood sweetheart... [I]f you didn't know me my looks might scare you...I'm an easy-going good-natured guy." Transcript of March 14, 1978 at 26.

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We have long witnessed over the decades large numbers of persons (law offenders and law abiding) who, totally unsympathetic with the law's restraints, have resisted, by enormous effort, the nagging temptation to disobey its strictures, solely to avoid the hurt that would very well come to dear family and devoted friends. It must be said, we regret, that at no time has Ochs been willing to go that far. In this respect alone, he has much for which to atone.

Aid to law enforcement officials

Completely satisfied that during the past two years the defendant has maintained a very good work record and pleasant manner at the penitentiary, informed of his unfailing obedience to all rules and regulations appertaining to inmates there, and made privy to the defendant's confident expressions that rehabilitation already has set in, counsel advances the contention that "exemplary adjustment in prison which sets a positive model for other prisoners is as praise-

worthy and meaningful as assistance to law enforcement officials in the investigation of crimes." Movant's Memorandum at 16. Then, to our mind, counsel engages in hyperbole of the first order: "This is particularly true where, as here, celerious rehabilitation appeared to be in the realm of the miraculous." Id.

We have had frequent occasion to reduce (sometimes substantially) sentences we imposed, including "heavy sentences." Where the applicant (even a hardened offender) cooperated willingly and fully with the prosecuting authority and we were completely satisfied on that score, we have reduced the sentence. **See United States v. Garcia, 544 F.2d 681, 682 (3rd Cir. 1976)** ("[A] court may properly invoke its power to grant lenity to those who, having admitted transgressions against the sovereign, thereafter assist the sovereign in improving social order and the public welfare."); **United States v. Unterman, 433 F.Supp. 647, 648 (S.D.N.Y. 1977)** ("Our determination to grand de-

fendant's application and reduce his sentence is based upon [the fact that] we believe that defendant has made a genuine effort to cooperate with the Government...[W]e believe credit should be given for the sincerity of defendant's attempts at cooperation.") In each instance we were convinced that without the applicant's extensive help, extremely active racketeers would continue their nefarious practices without let-up. Very often, indeed, the information, the "leads," the secrets so revealed have brought serious offenders to account, with the usual result that convictions followed upon the thorough preparation of the facts and the law professionally presented by the determined prosecutor.

Thus, the commonwealth is the ultimate beneficiary of the prisoner whose efforts may well be regarded as truly praiseworthy and meaningful in his assistance to law enforcement officials in the investigation of crimes. We must add that, much to our surprise, we frequently learn (on

such applications to reduce sentence) that the offender "came forward" and without promise of reward made his disclosures which proved of significant benefit to the community, and did so fully aware at all times that his life and limb were in danger.

This experience and such others as we have had occasion to mention in the course of this opinion, enable us to discern the latent as well as the patent merits of the application before us. "The life of the law has not been logic," wrote Mr. Justice Oliver Wendell Holmes, "it has been experience." There also is great wisdom indeed in our Circuit Court's pronouncement in 1943:

> Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine...We are born with predispositions...Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference...Impartiality is not

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> gullibility. Disinterestedness does not mean child-like innocence.

In re Linahan, Inc., 138 F.2d 650, 651-54 (2d Cir. 1943).

Maximum sentence on income tax counts

Considerable attention is devoted by counsel to the maximum sentences we imposed on three of the five income tax counts (to run consecutively with each other and with the sentences on counts one and two). Despite his interpretation "it is understood that the Court's objectives in sentencing movant extended beyond vindication of the interests protected by the tax laws. The Court sentenced an offender who it felt was in need of punishment for a life time of ill deeds," we are urged: "At the very least the tax count sentences should be ordered to run consecutively with each other...The sentences imposed on the false tax exemption counts are substantially in excess of the norm for such offenses." Movant's Memorandum at 19,20. In support thereof, a series of cases is

set forth.[6]

The cases cited involved defendants regularly employed in professional pursuits or business; none appear to have had a prior criminal record. In sharp contrast, except for a relatively short period, this defendant had no lawful employment whatever. Instead he had acquired an extensive serious criminal record before we imposed sentence. Further, the evidence at trial revealed the ease with which he brazenly resorted to false swearing when he executed and filed his income tax returns -- characteristic of "an individual whose whole life from the age of 16 to his then age of 48 had shown a contemptuous disre-

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United States v. Stout, 601 F.2d 325 (7th Cir. 1979); United States v. Wilhelm, 570 F.2d 461 (3rd Cir. 1978); United States v. Slutsky, 487 F.2d 832 (2 Cir. 1973), cert. den. 416 U.S. 937 (1974); United States v. Cramer, 447 F.2d 210 (2d Cir. 1971); United States v. Lodwick, 410 F.2d 1202 (8th Cir. 1969), cert. den. 396 U.S. 841 (1970); Harris v. United States, 402 F.2d 464 (10th Cir. 1968); Genet v. United States, 375 F.2d 960 (10th Cir. 1967); Heidrich v. United States, 373 F.2d 540 (5th Cir.), cert. den., 387 U.S. 943 (1966); United States v. Moody, 371 F.2d 688 (6th Cir. 1967); United States v. Goldman, 352 F.2d 263

(continued)

gard for [the] law." United States v. Ochs, 595 F.2d 1247, 1262 (2d Cir. 1979).

Aside from all else, we must point out that the total period of confinement meted out in any case is of primary concern. For our purpose in the instant case "we are not concerned with how the sentence was structured." United States v. Ochs, 595 F.2d at 1262.

Cases defendant regards helpful

Counsel calls our attention to the meritorious and salutary impact which can result from the reduction of sentence process, pointing out instances in which judicial approval was recorded.[7] We certainly subscribe to the general

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6 (continued)

(3rd Cir. 1965); Pinedo v. United States, 347 F.2d 142 (9th Cir.), cert. den., 382 U.S. 976 (1965).

7 Counsel cites the following cases as being dispositive: United States v. Grayson, 98 S.Ct. 2610 (1978); Bordenkircher v. Hayes, 434 U.S. 357 (1978); United States v. Garcia, 544 F.2d 681 (3rd Cir. 1976); United States v. Sand, 541 F.2d 1370 (9th Cir. 1976), cert. denied, 429 U.S. 1103 (1977); United States v. Prince, 533 F.2d 205 (5th Cir. 1976); United States v. Donner, 528 F.2d 276 (continued)

pronouncements there to be found. However, they do not furnish an answer to the problem which confronts us here, for the facts and circumstances, as should be expected, differ from case to case. Not a single case cited (where sentence was reduced), for instance, dealt with either a determined offender or one who applied for early release on the slim evidence presented to us. In United States v. Erb, for example (cited in footnote 7, supra), the Court regarded the applicant "not a persistent or habitual offender)."

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7 (continued)

(7th Cir. 1976); United States v. Barber, 456 F.2d 579 (3rd Cir. 1972); United States v. Jones, 444 F.2d 89 (2 Cir. 1971); United States v. Kee Ming Hsu, 424 F.2d 1286 (2d Cir. 1970); United States v. Birnbaum, 402 F.2d 24 (2d Cir. 1968), cert. denied, 394 U.S. 922 (1969); United States v. Ellenbogen, 390 F.2d 537 (2d Cir. 1968); McCartney v. United States, 382 F.2d 116 (9th Cir. 1967); United States v. Magnano, 443 F.Supp. 876 (S.D.N.Y. 1978); United States v. Unterman, 433 F.Supp. 647 (S.D.N.Y. 1977); United States v. McIlwain, 427 F.Supp. 358 (D.C.D.C. 1977); United States v. Erb, 425 F.Supp. 1349 (S.D.N.Y. 1977); United States v. Liddy, 397 F.Supp. 947 (D.C.D.C. 1975), aff'd 530 F.2d 1094 (D.C. Cir. 1976), cert. denied, 426 U.S. 937 (1977); United States v. Stromberg, 179 F.Supp. 278 (S.D.N.Y. 1959).

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Conclusion

We do not despair of the defendant's chances ultimately to achieve moral values that will enable him to climb to higher ground. In the main, that is up to him. We do not say that his industry and pleasantness while in present confinement have been solely to earn "credits" which will support his application for parole and entitle him to other benefits; such conduct may be coupled with a strong desire to "go straight." We simply do not know -- so thin is the evidence before us. In view of what is known of the whole man before and since our sentence was imposed, satisfactory evidence of true rehabilitation and contrition, involving solidly embedded moral values that assure his own good moral living without danger to the community, are best left to the behaviorist, the psychiatrists and scholars in allied fields, whose impressive testimony might well turn the tide in defendant's favor.

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As we see it, we have no alternative: we are constrained to and to deny the application in all respects.

SO ORDERED:

New York, N.Y.
May 7, 1980

s/Irving Ben Cooper

UNITED STATES DISTRICT JUDGE

APPENDIX B

United States Court of Appeals
For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 16th day of September, one thousand nine hundred and eighty.

Present:

Hon. Wilfred Feinberg,
Hon. Henry J. Friendly,
Hon. James L. Oakes,
Circuit Judges.

United States of American,

Plaintiff-Respondent

v. 80-1193

George Ochs,

Defendant-Appellant.

O R D E R

This appeal is from the denial of a motion to review a sentence after judgment under **F.R.Cr. P. 35.** The original sentence of the United States District Court for the Southern District of New York, Irving Ben Cooper, Judge, was upheld on appeal in **United States v. Ochs, 595 F.2d 1247**

(2d Cir.), cert. denied, 444 U.S. 955 (1979). Principal grounds for the Rule 35 motion were that Ochs had made "positive institutional adjustment in prison..." and "demonstrated a commitment to self-improvement and adjustment," and emphasized were "his new attributes." The decision below took these considerations into account but discounted them in light of Ochs' past extensive criminal record, his lack of remorse at time of sentence, or lack of "meaningful evidence of true contrition," and the judge's views of "the whole man."

The principal ground argued on appeal is that Ochs was denied due process because his motion papers asked for the court to "obtain official copies of relevant materials from his prison record in Atlanta" but the court found, without obtaining any behaviorists', psychiatrists' or psychologists' report that

> In view of what is known of the whole man before and since our sentence was imposed, satisfactory evidence of true rehabilitation

> and contrition, involving solidly embedded moral values that assure his own good moral living without danger to the community, are best left to the behaviorist, the psychiatrists and scholars in allied fields, whose impressive testimony might well turn the tide in defendant's favor.

However, as the supplemental appendix attached to appellant's reply brief shows, there are no such reports available at the prison. While the Chief Medical Officer for the Atlanta Penitentiary has offered subsequent to the decision below to conduct an evaluation if required by the court, no such request was made to the court below prior to its judgment nor was any petition to rehear filed on this basis. On this record, therefore, there clearly was no due process violation.

Appellant's argument that the court was required to hold a hearing on the Rule 35 motion is unavailing in the light of the district court's discretion, **United States v. Slutsky, 517 F.2d 1222, 1226 (2d Cir. 1975)**, and the fact that Judge Cooper did not rely on absence of cooperation

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with law enforcement investigators in denying the motion.

Appellant's other arguments go to the merits of the Rule 35 motion denial. On this we rest on Judge Cooper's opinion.

s/W.F.
Wilfred Feinberg

s/H.J.F
Henry J. Friendly

s/J.L.O.
James L. Oakes

Circuit Judges.

APPENDIX C

United States Court of Appeals

Second Circuit

At a Stated Term of the United States Court of Appeal, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Eighth day of January, one thousand nine hundred and Eighty-one.

Present: Hon. Wilfred Feinberg, Chief Judge

Hon. Henry J. Friendly

Hon. James L. Oakes

Circuit Judges.

UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee,	:	
V.	:	80-1193
GEORGE OCHS, a/k/a "George the Ox",	:	
Defendant-Appellant.	:	

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, George Ochs,

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Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

s/A.D.F.
A. Daniel Fusaro,
Clerk